IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2005-0369
Appellee,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
RUBEN BEN BADILLA,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20043169

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Joseph T. Maziarz — Phoenix
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
Robb P. Holmes — Tucson
Attorneys for Appellant

E S P I N O S A, Judge.

¶1 After a jury trial, appellant Ruben Badilla was convicted of first-degree felony murder and sentenced to a prison term of natural life. On appeal, he argues the trial court

gave the jurors an improper felony-murder instruction and erred in denying his motion for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., 17 A.R.S. For the reasons expressed below, we affirm the conviction and sentence.

Factual Background

¶2 We view the evidence in the light most favorable to sustaining the verdicts and resolve all reasonable inferences against the appellant. *See State v. Greene*, 192 Ariz. 431, ¶ 12, 967 P.2d 106, 111 (1998). The evidence showed that on June 13, 2004, Badilla had been using heroin and drinking alcohol "all day." That evening, he and his girlfriend, Helena Mendoza, took her car to purchase more alcohol and go "for a little ride." Badilla eventually stopped the car at Famous Sam's sports bar, ostensibly to use the bathroom. He approached the victim, Scott Hunter, in the Famous Sam's parking lot as Hunter was leaving the bar and shot him in the abdomen just below the rib cage. Badilla took Hunter's cellular telephone and an identification badge that Hunter carried for his employment with Immigrations and Customs Enforcement (ICE). Badilla then got back into the car and Mendoza, who had "jumped to the driver's side" when she heard the gunshot, drove them away from the scene. A blood trail showed that, after being shot, Hunter walked away from his vehicle to a "desert area" nearby where he fell. His wallet, one of his credit cards, and "other miscellaneous items" were inside his vehicle, which was locked, and another of his credit cards, a Famous Sam's receipt, and a "key fob with some keys on it" were found on the ground near where

he had fallen. A forensic examination of the gunshot wound revealed the barrel of Badilla's gun had been pressed against Hunter's body when the shot had been fired.

¶3 Badilla was arrested and charged with first-degree murder and possession of a deadly weapon by a prohibited possessor. The trial court severed the counts and ordered the first-degree murder charge to proceed separately. The court instructed the jury on both premeditation and felony-murder theories of culpability and Badilla was convicted and sentenced as outlined above.

Felony Murder Instruction

¶4 Badilla contends the court's felony-murder instruction improperly permitted the jury to find him guilty after finding he had committed *any* felony rather than one of the predicate felonies listed in A.R.S. § 13-1105(A)(2).[1] The state argues the instruction was correct when viewed in its entirety and points out Badilla's failure to raise this objection below. The record confirms he did not object to the instruction; he has therefore waived all but fundamental error review. *See State v. Bass*, 198 Ariz. 571, ¶ 9, 12 P.3d 796, 800 (2000); *State v. Gendron*, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991). Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to this defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984).

[1]Section 13-1105(A)(2) defines felony murder as when a person causes the death of another "in the course of and in furtherance of" one of a certain set of felonies, including, *inter alia*, armed robbery and attempted armed robbery.

¶5 The court's felony-murder instruction provided:

> The crime of first degree felony murder requires proof of the following two things, the defendant committed or attempted to commit a felony offense; and, in the course of and in furtherance of this crime, or immediate flight from this crime, the defendant or another person caused the death of any person.
>
> . . . .
>
> A person commits first degree murder if, acting either alone or with one or more other persons, such person commits or attempts to commit armed robbery or attempted armed robbery, and, in the course of and in furtherance of such offense or immediate flight from such offense, such person or another person causes the death of any person.

The court then instructed the jury on armed robbery and attempt before concluding:

> With respect to the felony murder rule, insofar as it provides the basis for a charge of first degree murder, there is no requirement that the killing occurred while committing or engaged in the felony, or that the killing be a part of the felony. The homicide need not have been committed to perpetrate the felony. It is enough if the felony and the killing were part of the same series of events.
>
> Felony murder requires no specific mental state other than that which is required for the commission of the offense of armed robbery or attempted armed robbery.

¶6 Jury instructions must be viewed in their entirety when determining whether they adequately reflect the law. *State v. Haas*, 138 Ariz. 413, 425, 675 P.2d 673, 685 (1983). If the instructions "are 'substantially free from error,' the defendant suffers no prejudice by their wording." *State v. Walton*, 159 Ariz. 571, 584, 769 P.2d 1017, 1030 (1989), *quoting State v. Norgard*, 103 Ariz. 381, 383, 442 P.2d 544, 546 (1968). "'It is only when the

instructions taken as a whole are such that it is reasonable to suppose the jury would be misled thereby that a case should be reversed for error therein.'" *State v. Schrock*, 149 Ariz. 433, 440, 719 P.2d 1049, 1056 (1986), *quoting State v. McNair*, 141 Ariz. 475, 481, 687 P.2d 1230, 1236 (1984).

¶7 We do not believe the jurors were misled by the court's instruction. Despite its initial failure to do so, the court's instruction clarified that the jury could only find Badilla guilty of felony murder if it found he had "commit[ed] or attempt[ed] to commit armed robbery," one of the predicate felonies listed in § 13-1105. The instruction emphasized that armed robbery and attempted armed robbery were the only predicate felonies at issue by stating that felony murder "requires no specific mental state other than that which is required for the commission of the offense of armed robbery or attempted armed robbery."

¶8 Moreover, these instructions were the culmination of the state's contention throughout the trial, emphasized in its closing argument, that Badilla had committed or attempted to commit armed robbery. And the court did not instruct the jury on any other predicate felony. Thus, we find no error, much less fundamental error, with the court's instruction when viewed in its entirety. *See Haas*, 138 Ariz. at 425, 675 P.2d at 685 ("A case will ordinarily not be reversed because some isolated portion of an instruction, standing alone, might be misleading.").

¶9 Badilla next argues the instruction improperly permitted the jury to convict him of first-degree murder based on felony murder even if it found he had formed the intent to

deprive Hunter of his property *after* the murder had taken place. He points out that, for this reason, our supreme court has discouraged courts from using the following portion of the given instruction:

> With respect to the felony murder rule, insofar as it provides the basis for a charge of first degree murder, there is no requirement that the killing occurred while committing or engaged in the felony, or that the killing be a part of the felony. The homicide need not have been committed to perpetrate the felony. It is enough if the felony and the killing were part of the same series of events.

See State v. Miles, 186 Ariz. 10, 15, 918 P.2d 1028, 1033 (1996).

¶10 Although use of this language has been criticized, our courts repeatedly have found no error where (1) the discouraged language was included in an instruction along with the "in the course of and in furtherance of" language from the felony murder statute, A.R.S. § 13-1105(A)(2); and (2) evidence at trial showed that the killing had in fact occurred "in the course of and in furtherance of" the predicate felony. *See Miles*, 186 Ariz. at 15, 918 P.2d at 1033; *State v. Alvarez*, 210 Ariz. 24, ¶ 8, 107 P.3d 350, 353 (App. 2005), *vacated in part on other grounds*, 213 Ariz. 467, 143 P.3d 668 (App. 2006). Here, the court's felony-murder instruction included the statutory language, "in the course of and in furtherance of," and, as discussed below, there was evidence that Hunter had been killed in the course of and in furtherance of Badilla depriving, or attempting to deprive, Hunter of his property. Thus, we find no fundamental error in the court's instructions.

Sufficiency of the Evidence

¶11 Badilla also contends the evidence at trial was insufficient to sustain his conviction and his motion for judgment of acquittal should have been granted. "A judgment of acquittal pursuant to [R]ule 20 . . . is appropriate only when no substantial evidence warrants a conviction. Substantial evidence is proof that reasonable persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996) (citation omitted). In reviewing a trial court's denial of a motion for judgment of acquittal, we "will reverse only if there is a complete absence of 'substantial evidence' to support the conviction." *State v. Sullivan*, 187 Ariz. 599, 603, 931 P.2d 1109, 1113 (App. 1996), *quoting State v. Atwood*, 171 Ariz. 576, 596-97, 832 P.2d 593, 613-14 (1992).

¶12 Badilla's conviction was based on the jury's finding that he had committed or attempted to commit armed robbery, during the course of which Hunter was killed. Badilla contends, however, the evidence failed to establish that his intent to commit robbery co-existed with the use of force. He claims his three separate confessions to the murder demonstrate that he had not intended to rob Hunter,[2] points out that many of Hunter's valuables were left at the scene, and claims there were insufficient facts to support the state's proposed motive for the robbery that he needed money to purchase heroin. Badilla cites *State*

[2]Badilla told a friend on the night of the murder that he had killed a man who owed him $10,000. One week later, he told his mother he shot a man who had been harassing him inside Famous Sam's. He later told friends he had killed a federal agent.

v. Lopez, 158 Ariz. 258, 264, 762 P.2d 545, 551 (1988), for the proposition that, when evidence shows the intent to take items was formed after the murder, that evidence is insufficient to support a felony murder conviction based on the predicate felony of armed robbery.

¶13 In *Lopez*, the evidence showed that on the night of the murder the defendant and the victim had been "cruising" in the victim's car. *Id*. at 260, 762 P.2d at 547. The defendant returned home without the victim, but with the victim's car and wallet *Id*. at 261, 762 P.2d at 548. The defendant first denied to police any knowledge of the victim's death, but later claimed the victim had attacked him with a knife during a fight. *Id* at 261-62, 762 P.2d at 548-49. Following a jury trial, the defendant was convicted of armed robbery and first-degree murder and sentenced to death. *Id*. at 260, 762 P.2d at 547. Our supreme court found there was insufficient evidence to support the convictions of armed robbery and, subsequently, felony murder. *Id*. at 264, 762 P.2d at 551. The court found no evidence had supported the state's argument that the defendant had lured the victim to the murder scene for the purpose of robbing him, and it stated:

> Clearly, force was used on the victim and, just as clearly, property was later taken from him. However, the state failed to prove that the force was inflicted *in the course* of taking the property. The statutory definition of "in the course of committing" contained in A.R.S. § 13-1901(2) avails the state

> nothing because it presupposes a *robbery* has been committed. When the use of force and the taking of property are not contemporaneous, there may be a theft, but there is not a robbery.

Id.

¶14 As in *Lopez*, it is clear that force was used upon Hunter and that his property was taken from him by Badilla. Unlike in *Lopez*, however, the evidence showed the taking was contemporaneous with the use of force and there was also evidence showing that Badilla used force with an intent to deprive Hunter of his property. Badilla fired his gun while in face-to-face proximity with Hunter. Testimony established Hunter had not had any confrontations with patrons in the bar. And people who knew him well testified at trial, and none indicated that Hunter had ever met Badilla or would have had reason to have contact with him. There was also evidence that Badilla had fled the scene with Hunter's cell phone and badge within moments of shooting him. Cumulatively, this constituted circumstantial evidence from which the jury reasonably could infer that Badilla had approached Hunter, placed his gun against Hunter's body, and demanded his property. *See State v. Blevins*, 128 Ariz. 64, 67, 623 P.2d 853, 856 (App. 1981) (conviction may be based on circumstantial evidence alone); *see also State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993) (if reasonable minds can differ on inferences to be drawn from the evidence, the case must be submitted to the jury); *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987) ("To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the

jury."). The fact that Badilla had failed to obtain Hunter's wallet or the other valuables found locked inside Hunter's vehicle merely permitted the jury to infer as the state theorized, that Badilla had placed priority on escaping from a conspicuous crime scene. And the jury could give little or no weight to Badilla's argument that he had no logical motive for robbing Hunter; the jury was not required to necessarily ascribe logical motives to a person who had been using heroin and drinking alcohol "all day." We find substantial evidence to support Badilla's conviction.

Disposition

¶15 Badilla's conviction and sentence are affirmed.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge